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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

J.H. MCQUISTON, Plaintiff and Appellant, v. CITY OF LOS ANGELES, Defendant and Respondent.	B285686 (Los Angeles County Super. Ct. No. BC635701)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephanie M. Bowick, Judge. Affirmed.

J.H. McQuiston, in pro. per., for Plaintiff and Appellant.

Michael N. Feuer, City Attorney, Terry P. Kaufmann Macias, Senior Assistant City Attorney, Charles D. Sewell and Parissh A. Knox, Deputy City Attorneys, for Defendant and Respondent.

J.H. McQuiston appeals from the dismissal of his complaint against the City of Los Angeles after the trial court sustained the City's demurrer without leave to amend. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

McQuiston, who owns property in the City in an area designated an MR1 Restricted Industrial Zone, appealed to the Central Area Planning Commission the issuance of four variances allowing the Los Angeles Boys and Girls Club to expand its existing facilities for children at a location elsewhere in the zone in which McQuiston's property is located. McQuiston's appeal was unsuccessful.

McQuiston then sued the City, the Central Area Planning Commission, and the Mayor of Los Angeles; and he named the Boys and Girls Club as the Real Party in Interest. In his initial complaint, which he designated as a "Petition," McQuiston appeared to seek a writ of mandate as well as declaratory and injunctive relief. McQuiston later filed a first amended complaint that no longer referred expressly to a writ of mandate.

Both the City and the Boys and Girls Club demurred to the first amended complaint. The court sustained the demurrers with leave to amend. Both at the hearing on the demurrers and in its written ruling, the court commented on the absence of clarity in the first amended complaint and the difficulty of ascertaining what causes of action McQuiston was attempting to allege. The trial court noted that to the extent McQuiston was seeking to state a cause of action for declaratory relief to challenge the City's variance decision, he was required to do so by petitioning for a writ of administrative mandate. The court found, however, that McQuiston's first amended complaint was so

unclear that the court could not conclusively determine whether a petition for writ of mandate was time-barred. The court ruled that it was unable to determine whether McQuiston asserted any distinct claims for relief or whether the entire action should be characterized as one seeking review of an administrative decision. Accordingly, the court granted leave to amend the complaint.

In the second amended complaint, McQuiston challenged the city's authority to issue use variances in the MR1 Zone; and he also objected to the method by which the city provides notice of requested variances, the participation of city councilmembers in the variance process, the mayor's alleged use of undated resignations to remove appointees to area practice commissions, the city attorney's alleged failure to enforce the law regarding variances, and the costs for a variance appeal. McQuiston expressly alleged that he was not challenging the City's decision with respect to any particular parcel, but that he was instead contesting the constitutionality of the process itself. Accordingly, the Boys and Girls Club was not identified as a party in the second amended complaint; it was subsequently dismissed from the action.

The City demurred to the second amended complaint, asserting that none of the causes of action stated facts sufficient to constitute a cause of action. The trial court sustained the City's demurrers to the second amended complaint without leave to amend. McQuiston appeals.

DISCUSSION

I. Standard of Review

"On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed 'if any one of the several grounds of demurrer is well taken. [Citations.]' [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. [Citation.]" (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967 (*Aubry*).)

II. First Cause of Action: Issuance of Use Variances

The fundamental premise of McQuiston's second amended complaint, and the issue to which he devotes the most attention in this appeal, is his contention that the City is prohibited by the California Constitution, state law, and local law from issuing use variances. McQuiston's argument begins with the premise that a city's zoning laws set forth the permissible uses for a parcel of land so zoned, and that any use that is not expressly stated in the zoning law is barred. Because a use variance departs from the uses explicitly listed in the zoning ordinance, "[a] 'use' variance

(i.e., 'departure from law') by definition is inconsistent with uses listed per City's General Plan for a parcel." McQuiston concludes, "[I]t is impossible for [the] City to issue valid use-variances." (Emphasis omitted.) In the second amended complaint, McQuiston based his claim on his understanding of the interplay between various Government Code provisions regarding zoning ordinances, most particularly, Government Code section 65906,[1] concerning variances; and article XI, section 7 of the California Constitution, which provides that a city "may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."[2]

The trial court properly sustained the City's demurrer to this cause of action on the ground that section 65906, the statute prohibiting use variances, does not apply to charter cities such as Los Angeles. (§§ 65803, 65906.) Section 65803 states, "Except as otherwise provided, this chapter [Title 7, Division 1, Chapter 4] shall not apply to a charter city, except to the extent that the same may be adopted by charter or ordinance of the city." Section 65906, which falls within that chapter, contains no language making it applicable to charter cities. McQuiston believes that the constitutional requirement that local laws not conflict with general laws (Cal. Const., art. XI, § 7) means that

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[1] All further citations are to the Government Code unless otherwise indicated.

[2] While the majority of his allegations concerned the Government Code and the California Constitution, in one footnote, McQuiston also asserted that the Los Angeles Municipal Code, section 12.27 contained the same prohibition on use variances as that found in section 65906.

the provisions of section 65906 apply to charter cities as well as non-charter cities. This is incorrect. In section 65803, the Legislature expressly exempted charter cities from the general zoning framework except when the statute was expressly made applicable to charter cities—and by its own terms, section 65906 was not designated by the Legislature as applicable to charter cities.

On appeal, McQuiston argues that the trial court "misplaced its attention" when it analyzed only sections 65906 and 65803, and that prohibition on use variances also "derives from [Los Angeles Municipal Code section] 12.27, [the City's] general plan, [section] 65860," and the decision in *City of Los Angeles v. State of California* (1982) 138 Cal.App.3d 526 (*Los Angeles*). He quotes language from the decisions in *Los Angeles* and *Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 541, and he asserts that those decisions stand for the proposition that "an administrative-act allowing a use (by variance) not-allowed by the City's Plan and zoning is invalid because use-variance is incompatible per se with a Plan prohibiting the use." (Emphasis omitted.) He cites the Los Angeles Municipal Code's provisions on variances, section 12.27, subdivision (D) ("A variance shall not be used . . . to permit a use substantially inconsistent with the limitations upon other properties in the same zone and vicinity"); asserts that variances are de facto legislation beyond the scope of zoning personnel's authority; and states that the City's general plan must be amended before a parcel's permitted uses may be altered.

None of these authorities establishes a ban on use variances. Los Angeles Municipal Code, section 12.27, subdivision (D), expressly authorizes the City to issue variances

provided that certain criteria are met, one of which is that the variance will not adversely affect any element of the General Plan. The General Plan also contemplates variances, as it notes that the City Charter and the Municipal Code provide for variances and other mechanisms to relieve hardships from strict adherence to zoning regulations or dealing with special situations. (General Plan Framework, Chapter 1, Internal Plan Consistency, No. 5, "Zoning Approvals and Zoning Consistency." Section 65860 provides that city zoning ordinances must be consistent with its general plan, but McQuiston has not challenged any zoning ordinance. In the *Los Angeles* decision, the Court of Appeal held that section 65860 is not facially unconstitutional; it did not mention variances. (*Los Angeles*, *supra*, 138 Cal.App.3d at p. 535.) Nor did the court in *Lesher* discuss variances; in that case the Supreme Court held that an initiative ordinance was invalid because it was inconsistent with the general plan in effect at the time the initiative was adopted. (*Id.* at p. 545.)

McQuiston also complains that the trial court "failed to recognize proffered documents proving the City's policy violated City's clear law prohibiting use-variances." (Emphasis omitted.) He refers this court to a request for judicial notice that he filed in conjunction with the demurrer practice on a previous iteration of the complaint, but he fails to specify any portions of the seven documents attached to the request for judicial notice, comprising more than 50 pages, that support his assertion. He fails to describe the court's purported error with any particularity; we are unable to determine whether he contends that the trial court made an erroneous ruling regarding judicial notice or that it failed to appreciate his arguments concerning the import of the

documents in question. McQuiston, moreover, includes neither legal analysis nor citations to authority to support this claim. "To demonstrate error, appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error. [Citations.] When a point is asserted without argument and authority for the proposition, 'it is deemed to be without foundation and requires no discussion by the reviewing court.' [Citations.] Hence, conclusory claims of error will fail." (*In re S.C.* (2006) 138 Cal.App.4th 396, 408.)

McQuiston has not demonstrated any error in the trial court's ruling sustaining the demurrer to his first cause of action.

III. Second Cause of Action: Notice

McQuiston alleged in his second cause of action that the "notice of prospective variance to parcels in the Plan zone is invalidly-selective," and he asserted in his opposition to the City's demurrer that the notice procedures deny him due process. The trial court sustained the City's demurrer to this cause of action on the ground that the second amended complaint did not include any facts establishing that McQuiston had a property, life, or liberty interest that was diminished by the City's allegedly deficient notice of its variance proceedings.

On appeal, McQuiston characterizes his cause of action as requesting the court "[t]o declare per *Harris v. County of Riverside* (1990) [904 F.2d] 497: City should notify all parcels *within* the specific zone about a variance request therein, and also notify parcels *outside* the zone if they also may be environmentally-affected by such variance." The court in *Harris*, however, held that a property owner was denied procedural due process when the county failed to notify him of its plan to rezone

his property. (*Id.* at p. 504.) The decision does not stand for the principle that the owner of every property in a zone is entitled to notice of a requested variance.

Later in McQuiston's opening brief he sets forth the notice provisions of Los Angeles Municipal Code section 12.27, and he complains extensively about the City's variance appeal process. In his reply brief, under the heading, "Deprivation of a Property Interest," McQuiston states that the "City claims [that] property owners have no recognized property interest when a use variance is granted." He argues that the City's contention, if true, would mean that a property owner could not complain about intolerable noise generated by unlawful use of an adjacent parcel. He quotes from *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, which concerns the role of the court reviewing variances in proceedings for writ of mandate, and he argues that the City can be sued for its staff's "constitutional-torts endorsed by City's unlawful policies." In none of these arguments does McQuiston present factual and legal analysis demonstrating that he pleaded facts showing that a property, life, or liberty interest was diminished by the City's notice practices. Accordingly, he has failed to meet his burden to demonstrate error by relevant argument, supported by citation to legal authority and facts in the appellate record. (*Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502 [appellant has the burden to demonstrate error by relevant argument, supported by citation to legal authority and facts in the appellate record; if appellant does not do so, the claim will not be considered].)

IV. Third Cause of Action: Unlawful Participation in Execution of City's Laws

In his third cause of action, McQuiston alleged that city legislators unconstitutionally participate in variance proceedings in violation of article III of the California Constitution, which prohibits a legislator from taking part in the executive or judicial process pertaining to a law. The trial court sustained the demurrer on the ground that article III pertains to state government, not local government; that McQuiston had provided no authority to support the proposition that anyone is prohibited from speaking during public commentary before the City Commission by virtue of his or her title; and that the authority on which McQuiston relied, *I.N.S. v. Chadha* (1983) 462 U.S. 919, (*Chadha*) is inapposite.

On appeal, McQuiston refers to a transcript of his appeal proceeding before the Los Angeles Central Area Planning Commission, and he claims that a representative of the City Council dictated the "command-decision" to the commission. He then quotes portion of an opinion of California's Office of the Attorney General, and states without authority that a court "could define the commission as comprising 'a standing committee of the City' and impose" a restriction from the Government Code. Next, McQuiston describes and quotes from the decision in *Chadha*, *supra*, 462 U.S. 919. Without any analysis, he concludes, "The trial-court rejected what *Chadha* prescribed. The court would *allow* Councilpersons to dictate decisions to executive-branch administrators, making '*administrative' adjudications a sham*."

McQuiston has not met his burden to demonstrate error in the trial court's ruling. He "has presented virtually no analysis in [his] appellate briefs to support [his] challenge. There is no

presentation of the elements of the causes of action, and, correspondingly, no attempt to cite the facts alleged in [his] amended complaint that correspond to such elements." (*Colores v. Board of Trustees* (2003) 105 Cal.App.4th 1293, 1301, fn. 2 (*Colores*).) "The dearth of true legal analysis in [his] appellate briefs amounts to a waiver of the demurrer issue and we treat it as such." (*Ibid*.)

V. Fourth Cause of Action: Mayor's Alleged Unlawful Termination of City Commissioners

McQuiston alleged in his fourth cause of action that the Mayor of Los Angeles may not legally remove City commissioners from their posts by means of undated resignations, and that commissioners cannot be impartial if the Mayor may remove them at his discretion. The trial court sustained the City's demurrer to this cause of action on the ground that the plain language of the City Charter, while setting the terms of office for commissioners, also granted the Mayor the power to remove members of most commissions without confirmation by the City Council and to appoint members for the remainder of a commissioner's remaining unexpired term. (Los Angeles Charter, §§ 501, subd. (c); 502, subd. (d).)

In his briefing on appeal, McQuiston claims that the "trial court should have looked more-closely at why [the City Charter] protects *lay* commissioners against nefarious-removal," and he argues that giving the Mayor the discretion to remove commissioners is unwise and permits mayoral "tampering with justice" (emphasis omitted), but he "develop[s] no argument revealing any flaw in the opinion. '[P]arties are required to include argument and citation to authority in their briefs, and the absence of these necessary elements allows this court to treat

appellant's . . . issue as waived.' [Citation.]" (*City of Arcadia v. State Water Resources Control Bd*. (2006) 135 Cal.App.4th 1392, 1428-1429.)

VI. Fifth Cause of Action: Alleged Misconduct by the City Attorney

McQuiston contends in this cause of action that the City Attorney is failing in his duty to the public to prosecute violations of the City Charter concerning the variance process and also "fails to advise properly, thereby causing commissions to commit prosecutable offenses, causing court actions by injured residents and/or landowners like Complainant." In sustaining the City's demurrer to this cause of action, the trial court noted that the City Attorney's client is the City, not McQuiston. (Former Rules Prof. Conduct, rule 3-600; Los Angeles Charter, § 272.) The court then observed that while the City Attorney prosecutes crimes on behalf of the People, for the City Attorney to act an underlying wrong must exist; and the second amended complaint did not set forth any causes of action that could be asserted against the City. For these reasons the court sustained the demurrer to this cause of action without leave to amend.

McQuiston contends that the court erred. In his opening brief, he asserts that former rule 3-600 of the Rules of Professional Conduct and the City Charter's provision that the City Attorney has a duty to act in conformity with professional and ethical obligations (Los Angeles Charter, § 271) "must be interpreted as connecting counsel to electors regarding overseeing the propriety of City process." (Emphasis omitted.) He observes that he had repeatedly placed the City Attorney on notice that "abatement is required, to no avail." McQuiston contends that the City Attorney could have "advised the City

without further-ado to require applicants to withdraw their requests to commit [General] Plan violations." Finally, he argues that the City Attorney acted in contempt of the law and the People by filing its demurrer because the law is clear that variances are prohibited. In his reply brief, he complains about the quality of representation provided by the City Attorney to the Central Area Planning Commission, alleging that the City Attorney "withhold[s] proper advice" and "deliberately-advise[s] unlawful process" (emphasis omitted), and that this conduct "prejudices the hearing and forces substantial and costly litigation in court to receive appropriate justice."

As we have discussed above, the City is not prohibited as a matter of law from issuing variances. Therefore, the City Attorney cannot have committed misconduct or violated any duty by failing to intercede to stop the issuance of variances or by defending the City's power to do so in court. Moreover, despite McQuiston's insistence that the City Attorney has a duty to the electorate, he has not established any standing to sue based on the allegedly inadequate representation the City Attorney provides to the City. The trial court properly sustained the demurrer to this cause of action.

VII. Sixth Cause of Action: Excessive Fees

McQuiston's final cause of action asserted that the fees charged for the variance process are arbitrary and based on a fee schedule rather than on the cost of the City's actual work on the variance issue, in violation of articles XIII C and XIII D of the California Constitution. As the trial court correctly ruled, neither of these articles pertains to variance process fees. (See *Apartment Assn. of Los Angeles County v. City of Los Angeles* (2001) 24 Cal.4th 830, 842-843 [Article XIII D applies "only to

exactions levied solely by virtue of property ownership"].) Moreover, as the trial court also noted, while variance fees are governed by section 66014, the period in which to seek judicial review of the fee schedule has long since passed, as the authorizing provisions in the City Charter were last amended years before the filing of the initial complaint in this action. (§ 66014, subd. (c) [judicial proceedings concerning the action authorizing the adoption of a fee for zoning variances must be brought pursuant to § 66022]; § 66022, subd. (a) [any judicial proceeding to challenge a local agency's adoption of a new fee or service charge or modification of an existing fee or service charge must be commenced within 120 days].)

On appeal, McQuiston has not demonstrated any error in the court's analysis. His assertion that the state Constitution forbids these variance charges is supported by reference to two articles of the California Constitution without identifying any specific provisions on which he relies, and his argument lacks any substantive legal analysis in support of his claim that the trial court erred. He cites the decision in *Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, but that decision concerns the legality of special assessments imposed by local governments, not fees charged for services.

McQuiston also argues that the court was required to conduct an "inquiry into the basis for the fee" (emphasis omitted) because neither the City nor the trial court denied that the fee schedule was discriminatory and that it exceeded the amounts permitted by law. This argument fails to appreciate the purpose of a demurrer. "'It is not the ordinary function of a demurrer to test the truth of the plaintiff's allegations or the accuracy with

which he describes the defendant's conduct. A demurrer tests only the legal sufficiency of the pleading.' [Citation.]" (*Bader v. Anderson* (2009) 179 Cal.App.4th 775, 787.) The fact that the City argued, and the trial court ruled, that the allegations of the operative complaint were insufficient to state a cause of action is not a concession or determination that the fee schedule was excessive or discriminatory. McQuiston has not established any error in the court's ruling. (*Colores*, *supra*, 105 Cal.App.4th at p. 1301, fn. 2.)

VIII. Leave to Amend

The trial court abuses its discretion in refusing leave to amend if the plaintiff can show that he or she is able to state a claim for relief. (*Aubry*, *supra*, 2 Cal.4th at p. 967.) McQuiston did not advise the trial court of any allegations he could add or alter to salvage the complaint, nor has he sought leave to amend on appeal or made a showing on appeal that he could have amended his complaint to state a cause of action. In the absence of such a showing, the trial court did not abuse its discretion when it did not grant leave to amend the complaint.

DISPOSITION

The judgment is affirmed. Respondent shall recover its costs on appeal, if any.

ZELON, J.

We concur:

PERLUSS, P. J. SEGAL, J.